Kassim @ Osman bin Ahmad v Dato' Seri Jamil Khir bin Baharom Menteri di Jabatan Perdana Menteri (Hal Ehwal Agama Islam) & Ors

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO 25–119–06 OF 2014
ASMABI MOHAMAD J
13 JUNE 2015

Civil Procedure — Judicial review — Certiorari — Application for — Rules of Court 2012, O 53 — Declaration to quash decisions, actions and or omission of Jabatan Agama Islam Wilayah Persekutuan, Chief Syarie Prosecutor of Federal Territories and Minister in Prime Minister's Department — Applicant arrested, detained and removed from Kedah to Wilayah Persekutuan — Whether applicant bound by fatwa of Federal Territories — Whether civil courts vested with jurisdiction to hear and dispose of judicial review application — Whether applicant exhausted remedy provided within Syariah judicial system

This was the applicant's application for judicial review pursuant to O 53 of the Rules of Court 2012 ('the ROC') for an order of declaration and certiorari to quash the decisions, actions and/or omissions of Jabatan Agama Islam Wilayah Persekutuan ('JAWI') with respect to the raid and search of the applicant's house in Kedah followed by the arrest, detention and removal of the applicant from Kedah to Wilayah Persekutuan; the action and decision of the Chief Syarie Prosecutor of the Federal Territories ('CSPFT') to prosecute the applicant and in refusing to provide the documents to the applicant; and the omission of the Minister in the Prime Minister's Department ('the Minister') to intervene and discharge his duties consistent with the Federal Constitution. The enforcement officers of JAWI ('JAWI Officers'), accompanied by the police, unlawfuly raided, searched and examined the applicant's house including breaking down the doors of the said house; detained, insulted and abused the applicant including taking several close up photographs of the applicant and his premises without the applicant's permission; detained and without any reason had caused the applicant to be removed from his house to the Kulim Police Headquarters by force and the applicant was further detained from 2.30pm; without any reason had caused the applicant to be removed by force from the Kulim Police Headquarters in a van at 5.30pm to the Penang International Airport at Bayan Lepas, Pulau Pinang. The applicant was further detained at the said Airport from 10pm to 11.30pm and the JAWI Officers forcibly caused the applicant to board a flight bound for the LCCT, Sepang, Selangor. The applicant was taken from the LCCT to JAWI's office at Kompleks Pusat Islam where he was further detained from 1.30am to 3.30am

for interrogation and examination by JAWI Officers. The applicant was taken to Putrajaya Syariah Court and produced by the Chief Syariah Prosecutor ('CSP') before the Syariah Subordinate Court Judge to be charged for two charges under ss 7(b) and 9 of the Syariah Criminal Offences (Federal Territories) Act 1997 ('Act 559'). The applicant was wrongly charged in the Syariah Subordinate Court at Putrajaya and the said Syariah Subordinate Court had no jurisdiction to try offences for which the applicant was charged and/or to impose bail under 'Bon Jaminan' in the form of cash deposit of RM3,000 for each charge and the total of which was RM6,000. The said Syariah Subordinate Court had no jurisdiction to impose further condition that the bailors shall be resident of the Federal Territory ('FT') before the applicant could be released. The applicant was not able to comply with the conditions imposed by the court and as a result, the applicant was further detained until the bailors turned up in the court at about 4.30pm to post bail. The applicant was detained for more than 27 hours. The CSP made the decision to prosecute the applicant on two charges under ss 7(b) and 9 of Act 559. The CSR amended the original charges and add a new charge which resulted in two charges being proffered against the applicant under s 7(b) and one charge under s 9 of Act 559. The applicant's requesting the Minister to intervene and cause the prosecution against the applicant to be withdrawn. However, the Minister did not respond. Due to the respondents' conduct, actions, decisions and omissions which had caused the applicant to suffer loss and damages, the applicant commenced judicial review proceedings against the respondents.

Held, dismissing the application:

(1) The court was vested with the jurisdiction to hear and dispose of the judicial review application. There was no prevailing circumstances to justify the re-opening of the issue of jurisdiction in this judicial review application as the Attorney General's Chambers ('AGC') did not appeal against the decision of the Court of Appeal. By not pursuing this matter to the Federal Court it would appear that the AGC had impliedly and/or expressly conceded that the High Court had jurisdiction to hear the judicial review application and the decision of the Court of Appeal on the issue of jurisdiction of the court was a final order to be respected by all parties to the proceedings (see para 18).

(2) The applicant contended that the respondents were not able to show that there was in fact a first information report or complaint under ss 2 and/or 74 of Syariah Criminal Procedure (Federal Territories) Act 1997 ('Act 560') before the commencement of the investigations. Section 54 of Act 560 does not require any informant's name to be disclosed in the first information report ('FIR'). Such information could be obtained from a layman and/or even the enforcement officer of the third respondent. The applicant's contention was not supported by any concrete evidence that

such report was false and/or had been 'fabricated' by the third respondent. There is nothing in s 54 of Act 560 to prohibit an enforcement officer of the third respondent to be an informant of the FIR. In this case, the FIR was given to another enforcement officer of the third respondent (see paras 25 & 29).

(3) The applicant had also mounted his challenge on the searches conducted by the second respondent claiming that the searches were not conducted in accordance with the law and the same being unlawful and ought to be quashed by the court. Despite the search warrant having been issued for applicant's premises in Kulim no search was actually conducted at the said premises. There was no impropriety and/or irregularity, which merited the interference of the court with respect to the search conducted by the third respondent's agent at these two premises (see paras 32 & 37).

(4) The powers and jurisdiction of JAWI officers are restricted to the Federal Territories. Such an arrest can be taken as if it was issued by the Syariah Court of Kedah and executed by the person who was vested with the authority to do so. In this case, the agent of Jabatan Agama Islam Kedah ('JAIK'). Therefore, in effecting the arrest of the applicant, the respondent had acted within the scope and confine of the law. The arrest was made by the officers of JAIK it was only proper for the applicant to be handed to the agent of the second' respondent as the warrant of arrest was issued within the local jurisdiction of Kedah and the Kedah Syariah Court may direct such person to be sent to the allocated designation as long as the applicant is brought before the Syariah Court without delay. This was done in this case (see paras 39, 41 & 48).

(5) The applicant's next contention was that the offences for which the applicant were charged with do not fall within offences, which could be tried in the Syariah Subordinate Court. Instead, he was taken to the said court to be charged. There was nothing illegal about this process which merited the interference by the court as the purpose of producing the applicant before the Syariah Subordinate Court was for the purpose to release the applicant from remand and for securing a bailor for the applicant's appearance in the Syariah High Court for offences he was charged with. The charges were read to him and no plea was recorded. The applicant was not tried in the Syariah Subordinate Courts as claimed (see paras 51 & 61).

(6) The applicant contended that he was not a Muslim resident in the FT and could not be subjected to a Fatwa issued in the FT. It was rather premature for the applicant to raise the issue of the legality of the charge. The issue with regard to the legality or otherwise of the charge against the applicant ought to be raised at the hearing of the charge in the Syariah High Court. The issue raised by the applicant that he is a resident of Kedah and therefore not bound by the FT laws, which was applicable,

only to persons domiciled in the FT could not be invoked in this judicial review hearing. This matter is a question of fact to be decided by the Syariah High Court (see paras 62 & 64).

(7) The applicant is entirely wrong in accusing the respondents having abused their powers when he had an alternative remedy within the Syariah Court's jurisdiction to appeal against the said decision. The applicant had blatantly refused to submit to the jurisdiction of the Syariah Courts and/or appealed against the Syariah Subordinate Court decision pertaining to the bail amount and conditions and/or resort to the appeal process' expressly provided by the law (see paras 72 & 78).

(8) The applicant failed to exhaust the remedy provided within the Syariah judicial system, which allows the applicant to seek remedy either in the Syariah Court where he was charged or the Syariah Appeal Court exercising the supervisory and revisionary powers. In view of the above, the applicant had not satisfied the requirement of s 44 of the Specific Relief Act 1950. The applicant blatantly refused to submit himself to the jurisdiction of the Syariah Court despite the fact that he could still challenge all the process leading to his prosecution in the Syariah High Court (see paras 88–89).

[Bahasa Malaysia summary

Ini adalah permohonan pemohon untuk semakan kehakiman menurut A 53 Kaedah-Kaedah Mahkamah 2012 ('KM') bagi perintah deklarasi dan certiorari untuk membatalkan keputusan, tindakan dan/atau peninggalan Jabatan Agama Islam Wilayah Persekutuan ('JAWI') berkenaan serbuan dan geledahan rumah pemohon di Kedah diikuti dengan tangkapan, tahanan dan alihan pemohon dari Kedah ke Wilayah Persekutuan; tindakan dan keputusan Ketua Pendakwaraya Syarie Wilayah-Wilayah Persekutuan ('KPSWP') untuk mendakwa pemohon dan kerana enggan memberikan dokumen-dokumen kepada pemohon; dan peninggalan Menteri di Jabatan Perdana Menteri ('Menteri') untuk campur tangan dan melepaskan kewajipannya selari dengan Perlembagaan Persekutuan. Pegawai-pegawai penguatkuasa JAWI ('pegawai penguatkuasa'), disertai polis, secara tidak sah telah menyerbu, menggeledah dan memeriksa rumah pemohon termasuklah memecahkan pintu-pintu rumah tersebut; menahan, menghina dan mendera pemohon termasuklah mengambil beberapa gambar foto secara dekat pemohon dan premisnya tanpa kebenaran pemohon; menahan dan tanpa apa-apa alasan yang menyebabkan pemohon dialih dari rumahnya ke Ibu Pejabat Polis Kulim secara paksa dan pemohon seterusnya ditahan dari 2.30 petang; tanpa apa-apa alasan yang menyebabkan pemohon dialih secara paksa dari Ibu Pejabat Polis Kulim dalam van pada 5.30 petang ke Lapangan Terbang Antarabangsa Pulau Pinang. Pemohon selanjutnya ditahan di Lapangan Terbang tersebut dari 10 hingga 11.30 malam dan pegawai JAWI secara paksa telah menyebabkan pemohon menaiki penerbangan ke LCCT, Sepang, Selangor. Pemohon telah diambil dari

LCCT ke pejabat JAWI di Kompleks Pusat Islam di mana dia seterusnya ditahan dari 1.30 pagi hingga 3.30 pagi untuk soal siasatan dan pemeriksaan oleh pegawai JAWI itu. Pemohon telah dibawa ke Mahkamah Syariah Putrajaya dan dikemukakan oleh Ketua Pendawaraya Syariah ('KPS') di hadapan Hakim Mahkamah Rendah Syariah untuk didakwa atas dua pertuduhan di bawah ss 7(b) dan 9 Akta Kesalahan Jenayah Syariah (Wilayah-Wilayah Persekutuan) 1997 ('Akta 559'). Pemohon secara salah telah didakwa di Mahkamah Rendah Syariah di Putrajaya da Mahkamah Rendah Syariah itu tiada bidang kuasa untuk membicarakan kesalahan-kesalahan yang mana pemohon didakwa dan/atau dikenakan jaminan di bawah bon kaminan dalam bentuk deposit tunai RM3,000 untuk setiap pertuduhan dan jumlah keseluruhan adalah RM6,000. Mahkamah Rendah Syariah tiada bidang kuasa untuk mengenakan syarat selanjutnya bahawa penjamin-penjamin hendaklah pemastautin Wilayah Persekutuan ('WP') sebelum pemohon boleh dilepaskan. Pemohon tidak dapat mematuhi syarat-syarat yang dikenakan oleh mahkamah dan akibatnya, pemohon telah ditahan lagi sehingga penjamin-penjamin hadir di mahkamah lebih kurang pukul 4.30 petang untuk membayar ikat jamin. Pemohon telah ditahan lebih dari 27 jam. KPS telah membuat keputusan untuk mendakwa pemohon atas dua pertuduhan di bawah ss 7(b) dan 9 Akta 559. KPS telah meminda pertuduhan-pertuduhan asal dan menambah satu pertuduhan baharu yang mengakibatkan dua tuduhan yang ditujukan terhadap pemohon di bawah s 7(b) dan satu pertuduhan di bawah s 9 Akta 559. Permohonan pemohon kepada Menteri untuk campur tangan dan menyebabkan pendakwaan terhadap pemohon ditarik balik. Walau bagaimanapun, Menteri tidak memberi maklum balas, akibat daripada perlakuan, tindakan, keputusan dan peninggalan responden-responden yang telah menyebabkan pemohon mengalami kerugian dan kerosakan, pemohon telah memulakan prosiding semakan kehakiman terhadap responden-responden.

Diputuskan, menolak permohonan:

(1) Mahkamah telah diberikan bidang kuasa untuk mendengar dan menyelesaikan permohonan semakan kehakiman. Tiada keadaan semasa untuk mewajarkan pembukaan semula isu bidang kuasa dalam permohonan semakan kehakiman ini kerana Jabatan Peguam Negara ('JPN') tidak merayu terhadap keputusan Mahkamah Rayuan itu. Dengan tidak meneruskan perkara ini ke Mahkamah Persekutuan ia kelihatan bahawa JPN secara tersirat dan/atau secara nyata menyatakan bahawa Mahkamah Tinggi mempunyai bidang kuasa untuk mendengar permohonan semakan kehakiman dan keputusan Mahkamah Rayuan berhubung isu bidang kuasa mahkamah adalah perintah muktamad yang patut dihormati oleh semua pihak kepada prosiding itu (lihat perenggan 18).

(2) Pemohon berhujah bahawa responden-responden tidak dapat

menunjukkan yang memang terdapat laporan maklumat pertama atau aduan di bawah ss 2 dan/atau 74 Akta Tatacara Jenayah Syariah (Wilayah-Wilayah Pesekutuan) 1997 ('Akta 560') sebelum bermula siasatan. Seksyen 54 Akta 560 tidak memerlukan mana-mana nama pemberi maklumat didedahkan dalam laporan maklumat pertana ('LMP'). Maklumat tersebut boleh diperoleh daripada orang biasa dan/atau pegawai penguatkuasa respoden ketiga. Hujah pemohon tidak disokong oleh apa-apa keterangan kukuh bahawa laporan tersebut palsu dan/atau telah 'fabricated' oleh responden ketiga. Tiada apa-apa dalam s 54 Akta 560 yang menghalang pegawai penguatkuasa responden ketiga menjadi pemberi maklumat LMP. Dalam kes ini, LMP telah diberikan kepada pegawai penguatkuasa lain responden ketiga (lihat perenggan 25 & 29).

(3) Pemohon juga telah melekapkan cabarannya berdasarkan geledahan yang dilakukan oleh responden kedua dengan mendakwa bahawa geledahan itu tidak dilakukan menurut undang-undang dan yang sama adalah tidak sah dan patut dibatalkan oleh mahkamah. Walaupun waran geledah telah dikeluarkan untuk premis pemohon di Kulim tiada geledahan sebenar dilakukan di premis tersebut. Tiada ketidakwajaran dan/atau luar aturan, yang mewajarkan campur tangan mahkamah berkenaan geledahan yang dilakukan oleh ejen responden ketiga di kedua-dua premis tersebut (lihat perenggan 32 & 37).

(4) Kuasa dan bidang kuasa pegawai-pegawai JAWI adalah terhad kepada Wilayah-Wilayah Persekutuan. Tangkapan sedemikian boleh dianggap seperti ia dikeluarkan oleh Mahkamah Syariah Kedah dan dilakukan oleh orang yang mempunyai kuasa untuk berbuat demikian. Dalam kes ini, ejen Jabatan Agama Islam Kedah ('JAIK'). Oleh itu, dalam melaksanakan tangkapan pemohon, responden telah bertindak dalam skop dan batas undang-undang. Tangkapan telah dibuat oleh pegawai-pegawai JAIK dan ia hanya wajar untuk pemohon diserahkan kepada ejen responden kedua kerana waran tangkapan telah dikeluarkan dalam bidang kuasa tempatan Kedah dan Mahkamah Syariah Kedah boleh mengarahkan orang tersebut dihantar ke tempat yang diperuntukkan selagi pemohon dibawa ke hadapan Mahkamah Syariah tanpa kelewatan. Ini telah dilakukan dalam kes ini (lihat perenggan 39, 41 & 48).

(5) Hujah pemohon seterusnya adalah bahawa kesalahan-kesalahan yang mana pemohon didakwa tidak terangkum dalam kesalahan-kesalahan itu, yang boleh dibicarakan di Mahkamah Rendah Syariah. Sebaliknya, dia telah dibawa ke mahkamah untuk didakwa. Tiada apa-apa yang menyalahi undang-undang tentang proses ini yang mewajarkan campur tangan oleh mahkamah kerana tujuan mengemukakan pemohon di hadapan Mahkamah Rendah Syariah adalah bagi tujuan melepaskan pemohon daripada tahanan dan untuk mendapatkan penjamin bagi

kehadiran pemohon di Mahkamah Tinggi Syariah kerana kesalahan-kesalahan dia didakwa. Pertuduhan-pertuduhan telah dibaca kepadanya dan tiada pli direkodkan. Pemohon tidak dibicarakan di Mahkamah Rendah Syariah seperti didakwa (lihat perenggan 51 & 61).

(6) Pemohon menegaskan bahawa dia bukan seorang pemastautin Muslim di WP dan tidak boleh tertakluk kepada fatwa yang dikeluarkan di WP. Ia agak pramatang untuk pemohon menimbulkan isu kesahihan pertuduhan. Isu berhubung kesahihan atau sebaliknya pertuduhan terhadap pemohon patut ditimbulkan di perbicaraaan pertuduhan di Mahkamah Tinggi Syariah. Isu yang ditimbulkan oleh pemohon bahawa dia adalah pemastautin Kedah dan oleh itu tidak terikat dengan undang-undang WP, yang boleh terpakai, hanya kepada orang-orang yang berdomisil di WP tidak boleh digunakan dalam perbicaraan semakan kehakiman ini. Perkara ini adalah persoalan fakta untuk diputuskan oleh Mahkamah Tinggi Syariah (lihat perenggan 62 & 64).

(7) Pemohon memang salah kerana menuduh responden-responden menyalahguna kuasa mereka apabila dia mempunyai remedi alternatif dalam bidang kuasa Mahkamah Syariah untuk merayu terhadap keputusan tersebut. Pemohon terang-terangan enggan untuk tidak tertakluk kepada bidang kuasa Mahkamah Syariah dan/atau merayu terhadapa keputusan Mahkamah Rendah Syariah berkenaan jumlah jaminan dan syarat-syarat dan/atau mengambil jalan keluar dengan proses rayuan yang jelas diperuntukkan oleh undang-undang (lihat perenggan 72 & 78).

(8) Pemohon telah gagal untuk menggunakan semua remedi yang diperuntukkan dalam sistem kehakiman Syariah, yang membenarkan pemohon memohon remedi sama ada di Mahkamah Syariah di mana dia didakwa atau Mahkamah Rayuan Syariah menggunakan kuasa-kuasa pengawasan dan penyemakan. Berdasarkan di atas, pemohon tidak berpuas hati dengan keperluan s 44 Akta Relief Spesifik 1950. Pemohon terang-terangan enggan untuk tidak tertakluk kepada bidang kuasa Mahkamah Syariah meskipun fakta yang dia masih boleh mencabar semua proses yang membawa kepada pendakwaannya di Mahkamah Tinggi Syariah (lihat perenggan 88–89).]

Notes

For cases on certiorari, see 2(3) *Mallal's Digest* (5th Ed, 2015) paras 5584–5593.

Cases referred to

Carlow Kilkenny Radio Ltd, Kildare Radio Ltd and Carlow Kildare Radio Ltd, Applicants v Broadcasting Commission of Ireland, Respondent [2003] 3 IR 528 (refd)

Council of Civil Service Unions and Others appellants v Minister for the Civil Service [1985] AC 374, HL (refd)
Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers [1991] 1 MLJ 417, SC (refd)
Ho Kooi Sang v Universiti Malaya [2004] 2 MLJ 516, HC (refd)
Holiday Villages of Malaysia Sdn Bhd v YB Menteri Sumber Manusia & Anor [2009] 6 MLJ 402, CA (refd)
Koon Hoi Chow v Pretam Singh [1972] 1 MLJ 180b (refd)
Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & other appeals [2002] 4 MLJ 449, FC (refd)
Ng Bee v Chairman, Town Council, Kuala Pilah [1975] 1 MLJ 273 (refd)
R v IRC, Re Natham (1884) 12 QBD 461, CA (refd)
Thien Tham Sang v United States Army Research Unit & Anor [1983] 2 MLJ 49, FC (refd)
Workon Sdn Bhd v Director of Lands & Survey, Sabah [1999] 4 MLJ 177, HC (refd)
Yeap Hock Seng @ Ah Seng v Minister For Home Affairs Malaysia & Ors [1975] 2 MLJ 279 (refd)

Legislation referred to

Administration of Islamic law (Federal Territories) Act 1993 ss 34, 43, 43(1), 44, 44(1), 46(2), 47(2), 51(1), 52, 53
Criminal Procedure Code s 51A
Courts of Judicature Act 1964
Federal Constitution arts 5, 7, 8, 10, 11
Kedah Syariah Enactment
Rules of Court 2012 O 53, O 53 r 3(2)
Specific Relief Act 1950 ss 41, 44
Syariah Criminal Offences (Federal Territories) Act 1997 ss 7(b), 9
Syariah Criminal Procedure (Federal Territories) Act 1997 ss 2, 7(b), 9, 22, 22(2), 23, 32, 33, 36, 37(1), 39, 40, 47, 54, 54(2), 74, 96, 185, 186, 191, Form 3

Rosli Dahlan (Bahari Yeow Tien Hong, Andy Tan Kai Sin & Fauza Sabila bt Faudzi with him) (Lee Hishamuddin & Gledhill) for the plaintiff.
Maisarah bt Juhari (Suzana bt Atan with her) (Senior Federal Counsel, Attorney General's Chambers) for the respondent.

Asmabi Mohamad J:

INTRODUCTION

[1] This was the applicant's application for judicial review pursuant to O 53 of the Rules of Court 2012 ('the ROC') for an order of declaration and a certiorari to quash the decisions, actions and/or omissions of, firstly the Jabatan

Agama Islam Wilayah Persekutuan ('JAWI') with respect to the raid and search of the applicant's house in Kedah followed by the arrest, detention and removal of the applicant from Kedah to Wilayah Persekutuan, secondly the action and decision of the Chief Syarie Prosecutor of the Federal Territories ('CSP') to prosecute the applicant and in refusing to provide the documents to the applicant, and thirdly the omission of the Minister in the Prime Minister's Department ('the Minister') to intervene and discharge his duties consistent with the Federal Constitution.

THE PARTIES

[2] For ease of reference the parties to this judicial review application are described and identified as follows:

(a) the applicant is Kassim @ Osman Ahmad, a Malay intellectual who is actively involved in Malay and Islamic intellectual discourses as well as Malay politics;

(b) the first respondent is the Minister in the Prime Minister's Department who has been entrusted with the tasks of Islamic Religious Affairs and responsible for all matters relating to Islamic faith including the coordination of Islamic laws with other federal laws as well as the implementation of Islamic laws in the Federation including the supervision of JAWI ('the Minister');

(c) the second respondent is the Chief Syarie Prosecutor of the Federal Territories vested with the powers under Act 505 to institute, conduct, discontinue any proceedings relating to Syariah offences committed within the Federal Territories of Kuala Lumpur, Labuan and Putrajaya. The second respondent is also authorised to prosecute persons who had committed the Syariah offences before a Syariah Court in the Federal Territories.

(d) the third respondent is an agency under the supervision of the Minister and vested with the powers for the administration and enforcement of matters relating to the Islamic faith.

THE DOCUMENTS

[3] For the purpose of this application the following documents were filed herein and referred to by the court:

(a) the application for judicial review dated 25 June 2014 ('encl 1');

(b) the statement pursuant to O 53 r 3(2) of the Rules of Court 2012 dated 25 June 2014 ('the statement - encl 2');

(c) affidavit in support of the judicial review application affirmed by the

applicant on 25 June 2014 ('the applicant's affidavit in support – encl 3'); A

(d) the notice of hearing of the judicial review application dated 25 July 2014 ('the notice – 'encl 11');

(e) the third and fourth respondents' affidavit in reply (1) affirmed by Paimuzi bin Yahaya on 25 August 2014 ('affidavit JAWI – 'encl 14'); B

(f) the second respondent's affidavit in reply (11) affirmed by Ibrahim bin Deris on 26 August 2014 ('affidavit CSP – encl 13'); and

(g) affidavit in reply by the applicant affirmed by the applicant on 11 September 2014 ('the applicant's AIR – encl 15'). C

BACKGROUND FACTS

[4] The background facts leading to the encl 1 had been summarised by the respective parties to the case. As both parties had their own set of facts leading to encl 11 I will attempt to digest these facts herein. For ease of reference I could not do better but to restate those facts summarised by the respective parties with some modifications, where necessary. These facts were as follows: D

(a) Facts from the applicant's perspective E

(i) on 26 March 2014 at about 11.30am, the enforcement officers of JAWI accompanied by the police came in 12 to 13 vehicle ('JAWI Officers') and raided the applicant's premises in Kulim, Kedah; and

(ii) in the course of that the JAWI Officers committed the following wrongful acts against the applicant ('the actions by JAWI'): F

(1) unlawfully raided, searched and examined the applicant's house including breaking down the doors of the said house;

(2) detained, insulted and abused the applicant including taking several close up photographs of the applicant and his premises without the applicant's permission; G

(3) detained and without any reason had caused the applicant to be removed from his house to the Kulim Police Headquarters by force and thereon the applicant was further detained from 2.30pm;

H

(4) without any reason had caused the applicant to be removed by force from the Kulim Police Headquarters in a van at 5.30pm to the Penang International Airport at Bayan Lepas, Pulau Pinang through heavy traffic and had arrived the airport at 10pm;

(5) the applicant was further detained at the said Airport from 10pm to 11.30pm on 26 March 2014 and the JAWI Officers had forcibly caused the applicant to board AirAsia aeroplane bound for the Low Cost Carrier Terminal ('LCCT'), Sepang, Selangor, where the applicant arrived on 27 March 2014 at 12.30am; I

(6) the applicant was taken from the LCCT to JAWIs office at Kompleks Pusat Islam at the wee hours of 27 March 2014 where he was further detained from 1.30am to

3.30am for interrogation and examination by JAWI Officers;

(7)he was then wrongfully detained at Rumah Kerajaan Jalan Duta, Kuala Lumpur on 27 March 2014 until 7.40am where the applicant was taken from the said Rumah Kerajaan to Putrajaya Syariah Court Complex at the Palace of Justice, Federal Territories ('Putrajaya Syariah Court');

(8)on the same day at about 9am, the applicant was produced by the CSP before the Syariah Subordinate Court Judge to be charged for two charges under ss 7(b) and 9 of the Syariah Criminal Offences (Federal Territories) Act 1997 ('Act 559');

(9)the applicant was wrongly charged in the Syariah Subordinate Court at Putrajaya and the said Syariah Subordinate Court had no jurisdiction to try offences for which the applicant was charged and/or to impose bail under 'Bon Jaminan' in the form of cash deposit of RM3,000 for each charge and the total of which was RM 6,000;

(10)the said Syariah Subordinate Court had no jurisdiction to impose further condition that the bailors shall be resident of the Federal Territory before the applicant could be released. This condition is unreasonable;

(11)the applicant was not able to comply with the conditions imposed by the court and as a result of which the applicant was further detained until the bailors turned up in the court at about 1.30pm to post bail. The applicant was detained for more than 27 hours;

(12)on 23 March CSP made the decision to prosecute the applicant on two charges under ss 7(b) and 9 of Act 559;

(13)on 6 May 2014 the CSP had made a decision to amend the original charges and add a new charge which resulted in two charges being proffered against the applicant under s 7(b) and one charge under s 9 of Act 559. In addition to that the applicant was required to provide an additional Bon Jaminan in respect of the new charge with the same conditions as the earlier two charges;

(14)pursuant to two letters dated 29 April 2014 and 21 May 2014 having been sent to the CSP and JAWI to request for certain documents to be provided to the applicant's solicitors for the purpose of the trial, the CSP had refused to provide the same and the CSP had vide his letter dated 26 May 2014 communicated to the applicant's solicitors that he had no intention to accede to such request.

(15)another letter dated 6 June 2014 was sent to the CSP conveying to the said CSP the reason as to why the CSP ought not to proceed with the charges proffered against the applicant but the CSP failed, refused and neglected to respond to the said letter;

(16)the applicant's solicitors then wrote to the Minister requesting the Minister to intervene and cause the prosecution against the applicant to be withdrawn. However, the Minister too did not respond;

(17)due to the respondents' conduct, actions, decisions and omissions which had caused the applicant to suffer loss and damages, the applicant has no choice but to commence the judicial review proceedings against the respondents;

(b) Facts from the respondents' perspective

(i) on 18 February 2014 the agent of the third respondent had received a complaint against the applicant pertaining to the commission of offences under ss 7(b) and 9 of Act 559 which relate to insulting or bringing into contempt the religion of islam and contempt and defiance of religious authorities by way of *fatwa*;

(ii) the offences were committed by the applicant while delivering a talk during a seminar known as 'Seminar Pemikiran Kassim Ahmad: Satu Penilaian' ('Seminar') held on the 15 and 16 of February 2014 at Yayasan Kepimpinan Perdana, at Putrajaya, a territory within the Federal Territories;

(iii) the third respondent had obtained the first search warrant dated 19 February 2014 from the Federal Territory Syariah Lower Court judge to search and seize documents from the premises where the seminar was held. The search warrant was served on the person who was in charge of the said premises and who had custody of the documents found in the said premises;

(iv) based on the investigation conducted by the third respondent and the documents that were seized from the said premises, an arrest warrant was issued and signed by the Syariah Lower Court judge of the Federal Territories on 25 March 2014 and endorsed by the Syariah High Court Judge of Kedah for the arrest of the applicant who at that material time resided in Kulim Kedah. The arrest warrant was addressed to the Kedah Religious State Authorities for execution;

(v) pursuant to the said warrant of arrest, the applicant was arrested around 2pm on 26 March 2014 at his home in Kulim, Kedah by the Kedah State Religious Authorities. He was brought to the Police Headquarters, Police District of Kulim at about 3pm and a police report on the said arrest was lodged by one Anwar Sharifuddin Mat Saad, a Kedah State Religious Authorities' officer;

(vi) the applicant was then brought by the Kedah State Religious Authorities to Bahagian Penguatkuasaan Agama ('BPA'), JAWI by flight from Penang Airport and arrived at the destination at 2.05am. The Kedah State Religious Authorities who had earlier accompanied the applicant from Kulim, Kedah had handed the applicant to the third respondent's agent. At this point the offences the applicant were alleged to have committed and the grounds were read to the applicant by the third respondent's agent;

(vii) the statements were recorded from the applicant for about 30 minutes after which he was taken to a residence in Kuala Lumpur to rest;

(viii) on 27 March 2014 at about 9.30am the applicant was taken from the residence in Kuala Lumpur to the Syariah Lower Court judge at Putrajaya where he was charged for two offences under ss 7(b) and 9 of Act 559. The charges were read and explained to the applicant. Around 9.50am he was released on bail with two sureties. The Syariah Lower Court judge had instructed for the applicant to be produced before the Syariah High Court judge for the charges to be read and plea taken on 7 April 2014. On this date, the charges were read again to the applicant before the Syariah High Court judge. The applicant pleaded not guilty to the two charges;

(ix) learned counsel for the applicant, En Rosli Dahalan filed his Wakalah to the Syariah High Court only on 6th May 2014. A copy of the same was served on the respondents on 6th May 2014;

(x) the applicant had objected to the jurisdiction of the Syariah Court to hear the matter under Act 505 and Act 560;

(xi) on 17 July 2014 the Syariah High Court judge of Putrajaya had made a finding that the Syariah Court of Putrajaya has jurisdiction to hear and determine the charges proffered against the applicant. The applicant did not file an appeal against the said finding until this moment; and

(xii) the trial had been postponed on the date set for trial as the applicant was indisposed. New dates had been allocated for trial.

THE ISSUES FOR THE COURT'S DETERMINATION

[5] The issues posed for this court's determination could be stated as follows:

(a) whether the civil court has the jurisdiction to hear and dispose of matters touching the conduct and actions of the respondents in the performance of their duties, which fall within the purview of the Syariah Court?

(b) whether the remedy prayed for prior the charge being proffered is academic in nature?

(c) whether the applicant had satisfied the requirements of s 44 of the Specific Relief Act 1950?

(d) whether the third respondent's actions prior to the charge being proffered against the applicant are lawful?

(e) whether the power to proffer charges against the applicant lies solely on the second respondent, the Chief Syariah Prosecutor?

(f) whether the prayer for wrongful prosecution against the second respondent is a valid cause of action against the respondents?

(g) whether an applicant who is a resident in Kedah can be subjected to enforcement under Act 560 if Act 559 and Syariah Court's jurisdiction under the Administration of Islamic law (Federal Territories) Act 1993 (Act 505) can only apply to the Federal Territories;

(h) whether the applicant can be arrested and charged under s 7(b) and s 9 of Act 559 through JAWI actions which had failed to comply with the provisions of Act 560.

(i) whether the enforcement action against the applicant in Kedah under the FT Syariah Acts must also be subject to compliance with the Kedah Syariah Enactments;

(j) whether s 7(b) and s 9 of Act 559 are inconsistent with the Kedah Syariah Penal Code;

(k) whether the applicant can be arrested and prosecuted under s 9 of Act 559 when at the material time the applicant is a Muslim resident in Kedah and subject to Kedah Syariah laws whereas the Federal Territories Syariah Court's jurisdiction under s 34 of Act 505 is only over Muslims resident in the Federal Territories;

(l) whether the applicant can be arrested and prosecuted under s 7(b) and s 9 of Act 559 when at the material times there are no similar offences under the Kedah Syariah Enactments; and

(m) whether the JAWI's action under s 7(b) and s 9 of Act 560 is in excess of arts 5, 7, 8, 10 and/or 11 of the FC to the extent that the fundamental liberties guaranteed to the applicant under the FC have been violated by JAWI's actions.

FINDINGS OF THE COURT

[6] Upon perusal of the cause papers, the extensive written submissions prepared by both parties and upon hearing the oral submissions by both learned counsel for the applicant and the senior federal counsel ('the SFC') my decisions are as follows:

(a) in hearing, this judicial review application I reminded myself that this is not an appeal against the decisions, actions and omissions of the respondents but a judicial review of their decisions, actions and omissions. The governing principle in judicial review is that the review is restricted to the decision making process, and not the merits, substance or justification of the decision in question. Therefore, it is not the function of this court at this stage to look at the correctness of the decisions, actions or omissions but rather with the way the decisions, actions and omissions were arrived that;

(b) there is a plethora of cases on point, which had delved on the functions

of the court in exercising its judicial review powers. Suffice for me to quote the very often quoted decision of Lord Roskill in *Council of Civil Service Unions and Others appellants v Minister for the Civil Service* [1985] AC 374 at p 374 as follows:

> ... This appeal is concerned with and only with judicial review. Judicial review, as my noble and learned friend Lord Brightman stated in *Chief Constable of the North Wales Police v Evans* [1982] 1 WLR 1155, at p 1174, 'is not an appeal from a decision, but a review of the manner in which the decision was made.

(c) (see *Carlow Kilkenny Radio Ltd, Kildare Radio Ltd and Carlow Kildare Radio Ltd, Applicants v Broadcasting Commission of Ireland, Respondent* [2003] 3 IR 528 *Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers* [1991] 1 MLJ 417 *Holiday Villages of Malaysia Sdn Bhd v YB Menteri Sumber Manusia & Anor* [2009] 6 MLJ 402);

(d) I have also reminded myself that it is settled law that to qualify as a subject for judicial review, the decision, actions and/or omissions must have the effect of altering the rights or obligations of the applicant and deprive him of some benefit or advantage (see *Council of Civil Service Unions & Ors v Minister for the Civil Service* at p 374); and

(e) mindful of my role as a judge exercising my judicial review powers, I will just focus on the manner the decisions, actions and/or omissions were allegedly made or omitted to do by the respondents and examine if the decisions, actions and/or omissions were tainted with what Lord Diplock described in *Council of Civil Service Unions & Ors v Minister for the Civil Service* at p 374 as 'illegality', 'Irrationality' and 'procedural impropriety'.

WHETHER THE CIVIL COURT HAS JURISDICTION TO HEAR THIS JUDICIAL REVIEW APPLICATION

Jurisdiction of the court to hear the case the issue of jurisdiction is res judicata

[7] Learned counsel of the applicant contended the respondents are estopped from raising the issue of jurisdiction of this court to hear this matter, which relate to the decisions, acts and omissions of the respondents in performing their statutory obligations under the jurisdiction of the Syariah Court as this issue is res judicata. Learned counsel raised the following arguments.

[8] The issue of jurisdiction had been ventilated and resolved at the leave stage when this issue was taken up on appeal to the Court of Appeal by the applicant and the said court had resolved the issue of the jurisdiction and allowed the appeal and remitted the matter back to the High Court for the judicial review application to be heard by the High Court. By remitting this

case to the High Court to be heard on the merits showed that this court is vested with the jurisdiction to hear the substantive motion.

[9] Although that was a decision on interlocutory matter it is binding on this court and on all parties to the lis until the same is reversed on appeal. As the Attorney General Chamber's did not appeal against the decision of the Court of Appeal, the decision of the Court of Appeal is valid and binding on all parties to the case.

[10] Further, this court being subordinate to the Court of Appeal is bound by the doctrine of stare decisis and should loyally follow the decision of the Court of Appeal. Hence, this court should dismiss the objection raised by the respondent on the issue of jurisdiction, which had already been heard and decided by the Court of Appeal.

[11] As this issue had been extensively ventilated during, the leave application in the High Court and the Court of Appeal this matter should rest and the respondent must respect and accept the decision of the Court of Appeal as correct.

[12] Learned counsel for the applicant submitted as this judicial review application involved interpretation of federal laws and state laws. Therefore, this court is the appropriate forum to resolve such issues as this court is a more superior court established under the FC. This matter also involved question of disputes between states such as Kedah and the Federal Territories. Obviously, the Syariah Court has no jurisdiction to decide and/or resolved such matters.

[13] The High Court must be slow in declining jurisdiction, as the judges are protectors of fundamental liberties of the subjects as enshrined in the FC.

[14] There could be areas of perceived overlapping jurisdictions between the civil court and the Syariah Courts. The essential issue is to determine what precisely is the core or the 'pith and substance' of the disputed subject matter and not the remedy approach.

[15] Among others, the learned SFC submitted the following. Irrespective of the decision of the Court of Appeal on the issue of the jurisdiction of this court to hear this matter by the fact that this matter was remitted to this court to be heard on the judicial review application the issue of jurisdiction is still a life issue and can be ventilated during the hearing of the substantive motion.

[16] Despite that there was no appeal lodged against the decision of the Court of Appeal on the issue of jurisdiction the respondent could still pursue the issue of jurisdiction of the court based on the factual matrix of this case.

[17] The doctrine of res judicata in a wider sense permits the respondent to raise the said issue again as the claim is a matter to be determined on the facts of each case having regard to where the justice of the individual and particular case lies.

[18] I will begin with the main issue posed for this court's determination, that is, the issue of the jurisdiction of this court to hear the judicial review application concerning matters which fall within the Syariah Courts as follows:

(a) the issue of jurisdiction had been seriously challenged by the Attorney General Chambers ('AGC') at the leave stage. The learned High Court judge who heard the leave application ruled in favour of the argument of the AGC that the High Court does not have the jurisdiction to adjudicate this matter as the subject matter of this case falls within the jurisdiction of the Syariah Court;

(b) the issue of jurisdiction was also seriously advanced before the Court of Appeal and after hearing both the applicant as well as the AGC, the Court of Appeal set aside the order of the High Court and granted leave to the applicant for the substantive motion to be heard on the merits;

(c) it is to be noted that the AGC who took the objection at the leave stage pertaining to the jurisdiction of the High Court to hear the matter had strongly objected to the issue of jurisdiction at the Court of Appeal. However, the AGC did not pursue the matter to the Federal Court;

(d) before me, the learned SFC took the views that the issue of jurisdiction is still a life issue at the hearing of the judicial review application. The SFC submitted that the reason the AGC did not pursue the issue of jurisdiction was because the AGC was of the view the threshold on whether leave ought to granted at the leave stage was much lower as compared to the threshold at the judicial review application. In view of that, the SFC submitted that this court is not precluded from raising the issue of jurisdiction at the hearing of the substantive motion;

(e) it was submitted by the SFC that this court ought to adopt 'the subject based approach' and not the 'remedy based approach' in resolving the issue of jurisdiction. In view of the offences alleged to have been committed by the applicant were under s 7(b) and s 9 of Act 559 which matters, the federal laws do not make provision for, the Syariah Court has exclusive jurisdiction over this matter and not the High Court;

(f) as could be seen above there were differences of opinion between the two

learned Counsels as to whether this court is vested with the jurisdiction to hear matters touching the jurisdiction of the Syariah Court. Learned counsel for the applicant had urged this court to follow the decision of the Court of Appeal in *Jabatan Agama Islam Wilayah Persekutuan & Ors v Berjaya Books Sdn Bhd & Ors* [2015] 3 MLJ 65 ('the Border's Case') because by the doctrine of stare desisis this court is bound by the decision of *Border*'s case;

(g) in resolving this issue of whether I am entitled to reopen the issue of jurisdiction of the court to hear this judicial review application l am guided by the decision of the Court of Appeal in *Border*'s case where almost the same points were raised by the SFC with regard to the issue of jurisdiction. The Court of Appeal in the *Border*'s case had stated as follows:

> We agree generally with the proposition of law but wish to add that we take the view that while the threshold in an application for leave may be lower in terms of facts, the threshold on matters of law would be the same as in the hearing of the judicial review itself. This is because the issue of jurisdiction of the court goes to the root of the matter before the court. It is a fundamental issue and it cannot be that a question of law will be decided on a lower standard in a leave application and the same question of law will be decided on a higher standard in the full hearing of the judicial review application.

(h) in *Border*'s case the Court of Appeal went further to rule that the learned High Court judge having in the first instance granted leave on the basis that the High Court was seized with the jurisdiction to hear the matter could not change his/her mind and overrule his/her own decision and hold that the High Court has no jurisdiction to hear the judicial review application;

(i) further, I am of the view that there is no prevailing circumstances to justify the reopening of the issue of jurisdiction in this judicial review application as the AGC did not appeal against the decision of the Court of Appeal;

(j) by not pursuing this matter to the Federal Court it would appear that the AGC had impliedly and/or expressly conceded that the High Court has jurisdiction to hear the judicial review application and the decision of the Court of Appeal on the issue of jurisdiction of the court was a final order to be respected by all parties to the proceedings;

(k) in view of the above quoted authority, I am of the view that it is not opened to the respondents to revisit the issue of jurisdiction before me. I hold that this court is vested with the jurisdiction to hear and dispose of this judicial review application;

(l) since there was an order by the Court of Appeal to remit the case back to me for the substantive motion to be heard and going by the doctrine of

stare desisis I am of the view that I am seized with the jurisdiction to hear this judicial review application; and

(m) however, I wish to make an observation here that the offence in *Border's* case relate to an offence which both the federal laws as well as the Syariah laws are vested with the powers to deal with but the case at hand relate to offences which fall exclusively within the jurisdiction of the Syariah Court. As the issue pertaining to jurisdiction was the only ground which was ventilated at the Court of Appeal and had been dealt with by the Court of Appeal and with the case being remitted to this court for the substantive motion to be heard on the merits I have to assume that I am seized with the jurisdiction to hear and to resolve this case and examine the case in the light of my supervisory powers under the Courts of Judicature Act 1964, the Specific Relief Act 1950, the Federal Constitution and within the framework provided under O 53 of the Rules of Court 2012('ROC').

[19] Before me, various grounds were relied by the applicant to challenge the whole process involving the applicant, right from the point he was arrested to the time he was charged in the Syariah Court and until the bail bond was executed.

Failure to provide documents

[20] The first point relate to the alleged refusal by the second and third respondents to provide the documents requested by the applicant for the purpose of his case before the Syariah Court. Learned counsel for the applicant submitted that Act 560, which is applicable to proceedings involving the precepts and the religion of Islam in the Federal Territories had adopted s 51A of the Criminal Procedure Code, which requires the prosecution to deliver documents to the accused persons for purposes of a fair trial. The second and third respondents had blatantly disregarded this provision and had denied the applicant of the documents he required for the purposes of a fair trial despite repeated requests.

[21] The respondent had no duty to provide the documents requested for as the 'Wakalah' which is a 'fiat' to enable learned counsel to be present in the Syariah Court and/or to represent the applicant and/or to be heard by the said court and/or to have access to the documents only came on the 6 May 2014 despite numerous mention dates having been fixed by the Syariah Court.

[22] It was the fault of the applicant in not complying with the provision of s 34 of Act 505 earlier and the respondent's refusal to supply the documents were justified.

[23] The said learned counsel had also failed to comply with practice direction 'Arahan Amalan No 2 Tahun 2004' which had clearly stipulated that it is mandatory for such document to be presented before learned counsel be given the right to appear and/or defend the applicant in the Syariah Court. A copy of the same must be served on the second respondent.

[24] The documents which the applicant sought from the second respondent are privileged documents. Therefore, the applicant has no right to inspect such documents. The refusal was justified and reasonable.

FIRST INFORMATION REPORT ('FIR') - NON-COMPLIANCE OF SECTION 74 (2) OF THE FT SYARIAH CPC

[25] The applicant contended that the respondents were not able to show that there was in fact a first information report or complaint under ss 2 and/or 74 of Act 560 before the commencement of the investigations. There was failure on the part of the third respondent to comply with the requirement of ss 74 and/or 2 of Act 560. Therefore, the whole process of investigation conducted by the second respondent was invalid.

[26] The production of exh PY4 which purported to have orally given as an 'Information to the Religious Enforcement Officer Form 5' as the basis of investigation is very suspicious and amounted to an afterthought.

[27] Exhibit PY4 was fabricated and/or tampered with, with the aim to justify the second respondent's action. Exhibit PY 4 had failed to comply with s 54 of Act 560. Therefore all actions pertaining to the applicant's arrest were invalid, null and of no effect.

[28] On the issue of the FIR which the applicant claimed had not been furnished to him, it is observed that the FIR in the form of exh PY3 in the affidavit of Paimuzi Yahya ('encl 14') is proper and in compliance with the provision of s 54 of Act 560 which merely requires the information of the offence to be reduced to writing and be read again by the enforcement officers.

[29] Section 54 of Act 560 does not require any informant's name to be disclosed in the FIR. Such information can be obtained from a layman and/or even the enforcement officer of the third respondent. The applicant's contention was not supported by any concrete evidence that such report was false and/or had been 'fabricated' by the third respondent. It is clearly stated that one Mohamad Fitri bin Razali, an enforcement officer of the three respondent was the complainant in the FIR ('Form 5'). There is nothing in s 54 of Act 560 to prohibit an enforcement officer of the third respondent to be an informant of the FIR. In this case, the FIR was given to one Mohammad Izehar

bin Md Amin who is also an enforcement officer of the third respondent.

[30] The report was made within reasonable time from the time of the alleged offence committed by the applicant. The document was contemporaneous. This FIR was made pursuant to s 54(2) of Act 560 and not ss 2 or 74 of Act 560 as perceived by the applicant.

[31] If it was the contention of the applicant that it was tainted by fraud, the applicant had not proven this fact on the standard required by the law. Neither was there any police report lodged by the applicant that the third respondent's officers were involved in fabricating evidence against him.

THE SEARCH WARRANT

[32] The applicant had also mounted his challenge on the searches conducted by the second respondent claiming that the searches were not conducted in accordance with the law and the same being unlawful and ought to be quashed by this court.

[33] I will deal with the first search conducted by the third respondent at the premises of Yayasan Kepimpinan Perdana, No1, Jalan P8H1, Presint 8, 62250 Putrajaya. There was a valid search warrant having been issued by the Syariah Subordinate Court Putrajaya to search this premises vide exh PY1 of encl 14. The search warrant dated 19 February 2014 made pursuant to s 47 of Act 560 was served on the person who has the control over the said premises, one Shaarani Abdul Rahman. Sharaani Abdul Rahman was also the person also had custody and control of the documents, which the second respondent required for its investigation.

[34] A perusal of exh PY5 would show that the second respondent had complied with the procedure with regards to the execution of the search warrant at the premises in Putrajaya where the search was conducted by the second applicant on 20 February 2014. Vide exh PY5 one Shaarani Abdul Rahman IC No 480813–14–5123 had acknowledged that the search was conducted and a list of items seized from the said premises was prepared, witnessed by two (2) witnesses, one Mohd Robi Ab Latif IC No 830917–03–5591 and one, Mohd Asyraf bin Md Noh IC No 850817–01–6543 respectively. Form 10 was prepared by one Rabidi bin Omar IC No 721008–03–5241.

[35] The second alleged search was at the applicant's premises No 1504, Jalan Kulim Height 3, Persiaran Kulim Golf, 09000 Kulim Kedah where a search warrant dated 25 March 2014 was issued by the Syariah Subordinate Court of the Federal Territory and endorsed by the Syariah High Court

(Kedah) vide exh PY3 of encl 14. The applicant had not shown in his affidavit that the third respondent's agent had conducted the search with respect to his premises in Kulim. Despite the claim that his door was broken by the third respondent's agent there was nothing in the affidavits to indicate the same.

[36] Exhibit PY6 in encl 14 it would appear that the third respondent's agent was not able to execute the search warrant as the officer and the rest in the raiding team was chased out by the applicant of the applicant's premises in Kulim. The third respondent's officer had only managed to arrest the applicant.

[37] From the facts disclosed in the affidavit of the third respondent it would appear that despite the search warrant having been issued for applicant's premises in Kulim no search was actually conducted at the said premises.

[38] On a perusal of encl 4 and the above exhibits, I could not detect any impropriety and/or irregularity, which merit the interference of this court with respect to the search conducted by the third respondent's agent at these two (2) premises.

JAWI HAS NO JURISDICTION BEYOND FT

[39] It was also contended by the applicant from the facts of the applicant's case as outlined above it is clear that the JAWI had acted in excess of its jurisdiction as the officers of JAWI had gone from Kuala Lumpur to Kedah and raided, searched, seized, detained and removed the applicant from the State of Kedah crossing Penang and Selangor in order to forcibly produce the applicant before the Putrajaya Syariah Subordinate Court. This could not be done, as the powers and jurisdiction of JAWI officers are restricted to the Federal Territories.

[40] The documents tendered by the third respondent via encl 14 clearly showed that there was in fact a police report lodged by the Kedah enforcement officer pertaining to the arrest of the applicant. This document clearly stated that the arrest was effected by the third party and not by the second respondent's agent. The arrest by the second respondent's agent was effective only at the point the applicant was handed to the Bahagian Penguatkuasa Agama Kuala Lumpur as exhibited in exh PY7 of encl 14.

[41] The arrest by the officers of JAIK pursuant to s 27(1) of *Enakmen* 12 which states that such an arrest can be taken as if it was issued by the Syariah Court of Kedah and executed by the person who was vested with the authority to do so. In this, case the agent of JAIK. Therefore, in effecting the arrest of the applicant, the respondent had acted within the scope and confine of the law.

A THE WARRANT OF ARREST ISSUED BY THE PUTRAJAYA SYARIAH SUBORDINATE COURT WAS IN BREACH OF THE FT SYARIAH CPC AND KEDAH SYARIAH ENACTMENTS

B **[42]** The applicant had also contended that the warrant of arrest as in exh PY2 in encl 14 did not comply with the requirement of s 39 of Act 560, as there was failure to endorse the warrant with the words 'For service outside jurisdiction'. This is fatal and therefore the execution is unlawful. There was also non-compliance of s 37 of the same Act and Form 3 in the Schedule.

C

[43] Further exh PY2 stated that the applicant shall be produced at JAWI's Office, in breach of the mandatory requirement that the person arrested to be brought before a court. The applicant in this case ought to have been brought before the Kulim Syariah Court in strict compliance of s 37(1) and Form 3 of
D Act 560. The process adopted by the third respondent was a clear violation of the above-mentioned provisions of Act 560.

[44] Upon perusal of exh PY2 against s 32 of Act 560 I am satisfied that the provision of s 32 of Act 560 had been complied with as the word court defined
E under Act 505 also made reference to the Syariah Subordinate Court pursuant to ss 43(1) and 44(1) of Act 505.

[45] Section 39 of Act 560need not be applied as the warrant of arrest was effected by JAIK officer and not the agent of the third respondent and this is in
F accordance with s 27 of the *Enakmen* 12 Kedah wherein it is provided that if the person to be arrested is believed to be in Kedah, any Syariah Court judge in Kedah may sign and endorsed the said warrant as if the same is issued by the Kedah Syariah Court.

G

[46] The Syariah Court may execute such warrant of arrest as if it is from the jurisdiction of Kedah pursuant to s 12 of the *Enakmen* 12 Kedah. Therefore, s 39 of Act 560 is not applicable and inoperable. Further s 39 of Act 560 made reference only to the process by way of summons and is not applicable to
H warrants of arrest. The clear words in s 39 with regard to service outside jurisdiction only relate to summons and not warrants of arrest. Section 39 of Act 560 provides:

> 39 (1) All *summonses* to appear and warrants of arrest issued by a Court may be served or executed, as the case may be, in any part of Malaysia; but no such *summons*
I shall be served outside the local limits of the jurisdiction of the Court issuing it unless the *summons* is endorsed by such Court with the words "For service out of jurisdiction.
>
> (2) No *summons* shall be endorsed by a Court issuing it with the words "For service out of jurisdiction" unless the Court is satisfied that there are special grounds for

allowing such service, which grounds shall be recorded before the *summons* is indorsed. (Emphasis added.)

[47] Therefore, the challenge mounted by the applicant against the respondent is baseless and unsupported by the clear and/or implied provision of law. Hence, the applicant had not shown how the third respondent was said to have contravened the law. Further, the third respondent had not breached s 39 of Act 560 as s 36 of Act 560 provided that the person arrested must be brought before the court without delay.

[48] As the arrest was made by the officers of JAIK it was only proper for the applicant to be handed to the agent of the second respondent as the warrant of arrest is issued within the local jurisdiction of Kedah and the Kedah Syariah Court may direct such person to be sent to the allocated designation as long as the applicant is brought before the Syariah Court without delay. This was done in this case.

[49] It was also the contention of the applicant that Syariah Subordinate Court does not have the jurisdiction to issue the warrant of arrest against the applicant by virtue of s 32 of Act 560. A close reading of s 32 read together with s 44(1) of Act 505 will clearly show that a 'Judge' within the meaning of Act 560 'means a Judge appointed under sub section 43(1) or 44(1) of Act 505', s 44(1) of Act 505 provides for appointment of judges of Syariah Subordinate Courts. Section 44(1) reads:

> The Yang di-Pertuan Agong may, on the recommendation of the Chief Syariah Judge, appoint from amongst members of the general public service of the Federation Judges of the Syariah Subordinate Courts.

[50] By reading ss 32 of Act 560and 43 and 44 of Act 505, the jurisdictions of the Syariah High Courts and the Syariah Subordinate Courts are as stated in ss 46(2) and 47(2) of Act 505. Therefore the warrant to effect the arrest of the applicant is valid and in accordance with the law.

THE APPLICANT WAS WRONGLY CHARGED IN THE SYARIAH SUBORDINATE COURT

[51] The applicant's next contention was that the offences for which the applicant were charged with do not fall within offences, which could be tried in the Syariah Subordinate Court. Instead, he was taken to the said court to be charged. Exhibits ID 5A, ID 5B and ID5 C of the affidavit of the CSP had the intitulement 'Dl DALAM MAHKAMAH TINGGI SYARIAH Dl MALAYSIA'. The charges against the applicant can only be preferred before the

Syariah High Court. Therefore, the applicant was recklessly produced and charged before the Syariah Subordinate Court, which clearly had no jurisdiction to hear the matter.

[52] This was further aggravated by the fact that the Syariah Subordinate Court had imposed bail bond, which was excessive, unreasonable and in excess of jurisdiction.

[53] The notes of proceedings of the Syariah High Court and the Syariah Subordinate Court showed that the applicant was arrested on 26 March 2014 at 2pm and on 27 March 2014 at 9.50am he was produced before the Syariah Subordinate Court to be released.

[54] The applicant was under remand and it was still well before the 24 hours detention. The applicant was produced before the Syariah Subordinate Court to be released from the remand if the applicant could secure bailors for purposes of proper bond to be executed to secure his attendance in the Syariah High Court.

[55] The applicant was present before the Syariah High Court on 7 April 2014 where the charges were read, plea recorded and trial date fixed to January 2015. Therefore, the applicant was properly charged and plea recorded in the Syariah High Court and not before the Syariah Subordinate Court. The procedure on how an arrested person is to be dealt with is provided under s 36 of Act 560.

[56] The notes of the proceedings vide exh lD 2 of encl 13 dated 27 March 2014 disclosed that the applicant was under remand within the twenty four (24) hours permissible by the law. The applicant was brought to the Syariah Subordinate Court at 9am for the purpose to release him from his detention and for the applicant's appearance to be secured on the next attendance date with the proper bond.

[57] For the above purpose ss 36, 40 and 23 of Act 560 are relevant. Section 36 states that the person who had been arrested by the religious officer or police officer or other persons executing a warrant of arrest must be brought to the court before which he is required by law to be produced without unnecessary delay and subject to s 33, as to security. (Note: the word court as I had discussed in the earlier paragraph could be either the Syariah Subordinate Court or the Syariah High Court). Section 40 relate to power of the court to issue bond for appearance with or without securities. Section 23 explained that no person who has been arrested could be released other than by a bond or bail or under the order in writing of a judge or religious officer or a police officer not below the rank of inspector.

[58] Therefore, from the reading of the above quoted sections of Act 560 it is clear that the applicant was produced before the, Syariah Subordinate Court for purpose of his release under bail with sureties and the charge made known to him. The submission of learned counsel would be relevant only if the applicant was charged, heard and tried and disposed of in Syariah Subordinate Court, which was not the case at hand.

[59] The applicant was produced before the Syariah Subordinate Court Judge for the purpose to deal with his detention and/or release and/or to secure the bond for his release and appearance in court. This was reflected in the notes of proceedings of the Syariah High Court and Syariah Subordinate Court which showed that on 27 March 2014 the applicant was brought before the Syariah Subordinate Court after his arrest on 26 March 2014 at 2pm to be dealt with in accordance with s 22 of Act 560. The steps taken by the applicant is consistent with the provision of s 22(2) of Act 560.

[60] The applicant was produced before the Syariah Subordinate Court merely for the purpose of the applicant's release without delay, in the event the case is adjourned unless the applicant is released on bail, he shall be remanded in prison or police custody under a remand warrant issued by the judge. In the case of the applicant, he was offered bail and bail was posted. He was released within reasonable time and in accordance with the provision of the law.

[61] Hence, there is nothing illegal about this process which merits the interference by this court as the purpose of producing the applicant before the Syariah Subordinate Court at 9am on 27 March 2014 was for the purpose to release the applicant from remand and for securing a bailor for the applicant's appearance in the Syariah High Court for offences he was charged with. The charges was read to him and no plea was recorded. The applicant was not tried in the Syariah Subordinate Courts as claimed. In any event, the notes of proceedings dated 7 April 2014 disclosed that the applicant's case was heard by the Syariah High Court pursuant to s 96 of Act 560 and the charges were read over to him and a hearing date was fixed to January 2015. All these actions are done pursuant to ss 36, 40 and 23 of Act 560.

THE CHARGE UNDER SECTION 39 OF THE FT SYARIAH OFFENCES ACT IS ILLEGAL

[62] The applicant further contended it is undisputed that the applicant is not a Muslim resident in the FT and that he is a resident in Kedah. Therefore, obviously the applicant cannot be subjected to a Fatwa issued in the FT, which is binding only on Muslim in the FT.

[63] The applicant claimed that as he is a resident in Kedah, he is subjected

to the Kedah Syariah laws and Fatwas. There is no equivalent provision of s 9 of the FT Syariah Act in the Kedah Syariah Criminal Code. Under the Kedah Syariah Criminal Code, it is not an offence if there is a failure to observe a Kedah Fatwa. Therefore, the Fatwa cannot be applied to the applicant, a resident of Kedah.

[64] I am of the view that it is rather premature for the applicant to raise the issue of the legality of the charge at the stage of hearing of the substantive motion. The issue with regard to the legality or otherwise of the charge against the applicant ought to be raised at the hearing of the charge in the Syariah High Court. The issue raised by the applicant that he is a resident of Kedah and therefore not bound by the FT laws, which is applicable, only to persons domiciled in the Federal Territories could not be invoked in this judicial review hearing. This matter is a question of fact to be decided by the Syariah High Court.

[65] The issue with regard to the jurisdiction of the court to hear the case had already been resolved by the said Syariah High Court, which had decided that it was vested with the jurisdiction to hear the case. The applicant ought to abide by this decision and/or filed a revision or an appeal against the Syariah Court if he is not satisfied with the said decision. By not appealing against the said decision and/or filing for a revision against the decision, the decision of the Syariah High Court to the Syariah Appeal Court the decision remained good and valid.

[66] As this issue involve the issue of fact and the Syariah High Court would be the best forum to resolve this issue. This court cannot take away that power from the Syariah High Court. In any event the applicant's contention that the decision is flawed is misconceived and an unreasonable.

DECISIONS, ACTS AND OMISSIONS OF THE RESPONDENTS WERE TAINTED WITH ILLEGALITY, IRRATIONALITY AND PROCEDURAL IMPROPRIETY AND TAINTED WITH MALA FIDE

[67] It was the submission of learned counsel for the applicant as the decisions, acts and omission of the respondents were in contravention of the relevant provisions of the respective FT Syariah laws as submitted by the applicants, the gist of which had been summarised in these grounds of judgment, the applicant claimed that the said decisions, actions and omissions were tainted with illegality, irrationality and procedural impropriety which warrants this court to interfere and to quash the said decisions, actions and omissions and/or for this court to grant the relief in the form of declaration sought by the applicant.

[68] The Syariah Court is conferred with the powers to hear and determine matters relating to the criminal offences committed in the Federal Territories. The relevant provisions of Act 560 and Act 559 read together with the other relevant statutes such as Act 505 have given the powers to the agents of the third respondent to execute all the powers to ensure all criminal offences are brought to the Syariah Court in name of justice and for the sake of safeguarding the precepts of Islam.

[69] The reliefs sought by the applicant revolve around the conduct of arresting, detaining, seizing and prosecuting the applicant for Syariah offences in the Syariah Court and the powers of the respondents to take all necessary actions leading to the prosecution are provided by the relevant laws. The second and third respondents are vested with all the powers to do all the acts in ensuring persons who committed the offences under Act 559 are investigated and prosecuted.

[70] The applicant had been formally charged in the Syariah Court for three offences, two offences under s 7(b) and one offence under s 9 of Act 559. These offences are offences touching the precepts of the religion of Islam, which fall solely under the jurisdiction of the Syariah Court.

[71] The applicant had failed to show to the court that the offences for which the applicant were charged with were also offences under the federal laws. Therefore, these offences are distinct, separate and exclusively under the purview of the Syariah Court and subject to the supervisory and revisionary powers of the Syariah Appellate Court stipulated under s 52 of Act 505 .

[72] If the applicant's application were to be allowed by this court, the efficacy of the jurisdiction to hear the offences preferred against the applicant will be impaired and prejudiced as the Syariah Court has already determined that it has jurisdiction to hear the offences proffered against the applicant. If the applicant is aggrieved by the said decision, he ought to have applied to the Syariah Appeal Court to review the decision and/or to appeal against the said decision (see s 52 of Act 505).

ABUSE AND UNREASONABLE EXERCISE OF POWER IN IMPOSING BAIL AND ITS TERMS AND CONDITIONS

[73] The applicant had alleged that there was abuse of power relating to the process of bail especially with regard to the amount and the conditions of bail set by the court. The applicant alleged that the terms of the bail imposed by the Syariah Subordinate Court were unreasonable. This line of contention had no merits at all as ss 185 and 186 of Act 560 empowers the Syariah Court to release

A the applicant on bail when the applicant was brought to the Syariah Subordinate Court.

[74] Sections 185 and 186 of Act 560 provide as follows:

B *When person may be released on bail*

185 *When any person* is arrested or detained without warrant by a Religious Enforcement Officer or police officer or appears or *is brought before a Court and is prepared at any time while in the custody of such officer or at any stage of the proceedings before such Court to give bail,* such person shall be released on bail by a Religious C Enforcement Officer or police officer in charge of a police station or by any police officer not below the rank of Inspector or by such Court.

Amount of bond

186 (1) *The amount of every bond executed under this Chapter shall be fixed with due regard to the circumstances of the case as being sufficient to secure the attendance of the* D *person arrested, but shall not be excessive.*

(2) The Syariah High Court may, in any case, whether there be an appeal on conviction or not, direct that any person be admitted to bail or that the bail required by a Religious Enforcement Officer or police officer or Syariah Subordinate Court be reduced or increased.

E

[75] The notes of proceeding dated 27 March 2014 of ID 2 of encl 13 showed that on the day in question when the applicant was produced in the Syariah Subordinate Court for the purpose of release, in event he was able to F furnish the bond to secure his appearance in the court, the court had ordered for the applicant to be released on a bond of RM3,000 with one surety for each offence. The records had also shown that the applicant had sought for the amount set by the court to be reduced. However, the decision was made by the Syariah Subordinate Court judge for the bail amount to be set at RM 3000 for each offence and one surety for each offence. G

[76] Clearly, this showed the Syariah Subordinate High Court had considered both applications for bail and had made the order with respect to bail based on the circumstances of the case and felt that it was not manifestly H excessive.

[77] If the applicant was of the opinion that the amount set by the court is excessive and/or the conditions imposed were unreasonable, the applicant ought to have sought the remedy in the Syariah High Court by way of an appeal I as provided under s 191 of Act 560 which states as follows:

Appeal

191 Any person aggrieved by any order or refusal of any Syariah Subordinate Court made under this Chapter may appeal to the Syariah High Court, and to the Syariah Appeal Court in the case of an order made by or a refusal of the Syariah High Court.

[78] Hence, the applicant is entirely wrong in accusing the respondents having abused their powers when he has an alternative remedy within the Syariah Court's jurisdiction to appeal against the said decision. The applicant had blatantly refused to submit to the jurisdiction of the Syariah Courts and/or appealed against the Syariah Subordinate Court decision pertaining to the bail amount and conditions and/or resort to the appeal process expressly provided by the law.

ACTIONS OF THE RESPONDENTS TAINTED WITH MALA FIDE

[79] The applicant claimed that the decisions, action and/or omissions on the part of the respondents were tainted with mala fide. On the totality of the evidence placed before this court I am satisfied that the applicant had failed to prove elements of mala fide for the following reasons:

(a) the process of arresting the applicant in Kedah and the production of the applicant to BPA of the third respondent was done by JAIK Kedah a party not cited herein;

(b) all decisions, actions and alleged omissions by the BPA of the third respondent until the applicant was produced before the Syariah Court on 27 March 2014 and subsequently charged for three offences under Act 559 were done within the purview of the relevant laws and reasonable;

(c) the time taken for the purposes of investigation and obtaining evidence for the purposes of the offence under ss 7(b) and 9 of Act 559 was within reasonable time and relate to offences concerning the precepts of the religion of Islam;

(d) the publication of the book entitled 'Hadith: Satu Penilaian Semula' and 'Hadith Jawapan pada Pengkeritik' by the applicant which consist of the teaching, precepts and believes which are against the Islamic teaching and believes had been banned and such fatwa had been *gazetted* since 1996 which had been not been cancelled up to this date;

(e) the question of whether the applicant is or is not a resident of FT is a question of fact that must be proven in the syariah offences proceedings. It cannot be disposed of summarily;

(f) there is no mandatory requirement that the applicant must be accompanied by a family member to Kuala Lumpur. Furthermore, there was no evidence shown by the applicant in his affidavits that he had requested for his family member to accompany him to Putrajaya and that such request was turned down;

(g) the applicant was not subjected for detention for 27 hours as the applicant was arrested on 26 March 2014 at 2pm and was released on the order of the Syanah Subordinate Court on 27 March 2014 at 9.50am

A once the bail was offered as stipulated in the notes of proceeding. The applicant was further detained after being produced in the Syariah Subordinate Court as he was not able to meet with the terms of the bail bond set by the Syariah Court and/or satisfy the conditions of the bond;

B (h) the investigation conducted by the second respondent was less than an hour on 27 March 2014 and the applicant failed to show that the third respondent have denied him the legal representation;

(i) the allegation that the charge is a non-offence is a question to be determined by the Syariah High Court, which has yet to commence and such court has jurisdiction to determine this issue;

C

(j) the third respondent has the power to seek for further remand, bond, sureties on which ultimately it is the Syariah Court judge will have power and/or discretion to grant or refuse as the learned judge seems fit;

D

(k) the prosecution against the applicant were for the offences under Act 559 which the second respondent is vested with the power to prosecute. The applicant failed to show the element of mala fide on the part of the second respondent;

E (l) such prosecution is based on the information received and the evidence gathered against the applicant;

(m) the first and second respondent had exercised their rights in considering the written representation sent by the applicant and the said letter was attended to. The applicant's written representation was rejected as there are no reasonable grounds shown by the applicant that justify the withdrawal of the charges against him; and

F

(n) with regard to the refusal to furnish, certain documents requested by the applicant such documents cannot be given as these documents are privileged documents and will be tendered later during the trial on which the applicant will have the opportunity to inspect and cross-examine the witness on such evidence.

G

H **[80]** With regard to mala fide the court was referred to the case of *Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & other appeals* [2002] 4 MLJ 449 where the Federal Court had referred to:

Basu's Commentary on the Constitution of India (15th Ed) Vol 2 at p 153 states:

I An order of detention is mala fide if it is made for a collateral or ulterior purpose, ie a purpose other than what the legislature had in view in passing the law of preventive detention (ie prevention of acts prejudicial to the security of the State, maintenance of public order and so on). There is a mala fide exercise of the power if the grounds upon which the order is based are not proper or relevant grounds which would justify detention under the provisions of the law itself or when it appears that the

authority making the order did not apply his mind to it at all, or made it for a purpose other than that mentioned in the detention order.

The question of mala fides has to be decided with reference to the facts of each case and the observations in one case cannot be regarded as a precedent in dealing with other cases.

The onus of proving mala fides is upon the detenu, and the trend of recent decisions shows that it is not likely that the detenu may succeed in many cases.

[81] In *Yeap Hock Seng @ Ah Seng v Minister For Home Affairs, Malaysia & Ors* [1975] 2 MLJ 279 at Tab 14 RBOA2 it was held, inter alia, that '(1) the onus of proving mala fide on the part of the detaining authority is on the applicant and is normally extremely difficult to discharge as what is required is proof of improper or bad motive in order to invalidate the detention or order for mala fide and not mere suspicions; and (2) where an order of detention is challenged on the ground of mala fide, what has got to be made out is not the want of bona fide on the part of the police, but the want of bona fide as well as the non-application of mind on the part of the detaining authority which for this purpose must be taken to be different from the police'.

[82] Therefore, premised on the above precedents the applicant had failed to support his contention based on mala fide by way of credible evidence in the affidavits filed for the purpose of the judicial review application. The applicant merely relied on bare allegations that the respondents have an ulterior motive to such conducts, decision and omission. This ground of challenge must therefore fall.

WHETHER THE PLAINTIFF IS ENTITLED TO THE DECLARATORY RELIEF

[83] The applicant in this judicial review application was seeking for declaratory relief, which is discretionary in nature. The substance of the law which confers the jurisdiction on the applicant to seek the remedy in the form of declaratory relief is s 41 of the Specific Relief Act 1950. Section 44 of the Specific Relief Act 1950 provides as follows:

44 (I) A Judge may make an order requiring any specific act to be done ... by any person holding a public office:

Provided that–

(a) An application for such an order be made by some person whose property, franchise, or personal right would he injured by the forbearing or doing, as the case may be, of the specific act;

(b) Such doing or forbearing is, under any law for the time being in force, clearly incumbent on the person or court in his or its public character, or on the corporation in its corporate character;

A (c) In the opinion of the Judge the doing or forbearing is consonant to right andjustice;

(d) The applicant has no other specific and adequate legal remedy; and

(e) The remedy given by the order applied for will be complete.

B

[84] It had been held in the case of *Koon Hoi Chow v Pretam Singh* [1972] 1 MLJ 180b that the five (5) conditions stated in s 44 are cumulative and must be fulfilled. Therefore it is incumbent on the applicant satisfy this court that he had fulfilled all these five (5) requirements before the reliefs by way of C declaration could be made. This principle had been adopted in a plethora of cases (*Ng Bee v Chairman, Town Council, Kuala Pilah* [1975] 1 MLJ 273*Thien Tham Sang v United States Army Medical Research Unit & Anor* [1983] 2 MLJ 49 *Workon Sdn Bhd v The Director of Lands & Survey, Sabah* [1999] 4 MLJ 177 *Ho Kooi Sang v Universiti Malaya* [2004] 2 MLJ 516*R v IRC, Re Natham* D (1884) 12 QBD 461).

DISCRETION OF THE COURT UNDER THE SPECIFIC RELIEF ACT 1950

E **[85]** In the applicant's application for judicial review he has sought to challenge the entire process of, inter alia, the following:

(a) his arrest, detention and search;

(b) breaches of Act 560, 559, 505, applicable to the Federal Territories;

F (c) non-compliance by third respondent's officers of the Kedah Syariah Enactment;

(d) all acts which had led to his prosecution in the Syariah Court;

G (e) failure of third respondent to furnish documents for purpose the Syariah Court charges;

(f) unreasonable bail amount and bail conditions;

(g) failure to respond to applicant's representation with respect of his prosecution; and

H

(h) failure of the first respondent to respond to the representation made by the applicant.

[86] The applicant alleged that in the performance of their duties under the I above-mentioned Acts, the second and third respondents had committed various breaches of the relevant provisions of the FT Acts as well as the Kedah Syariah Enactments rendering all actions taken by the said respondents to be tainted with illegality, procedural impropriety as well as irrationality. This had resulted in wrongful prosecution of the applicant in the Syariah Court.

[87] Looking at the facts of the case before me it would appear that the applicant: A

(a) can obtain the remedy he is seeking from this court in the Syariah Court.

(b) there is already a prosecution pending against the applicant in the Syariah High Court. The challenge with respect to the above matters could be raised and resolved in the Syariah Court before which the applicant was charged. B

(c) matters whether the Federal Territory laws are applicable to the applicant could also be raised and resolved at the Syariah High Court; C

(d) the request for documents too could be made to the Syariah High Court where the case against the applicant with respect of the three charges proffered against him are to be heard; and

(e) with respect to the documents, which the applicant required for the purpose of the trial of the three (3) offences proffered him this too could be raised at the Syariah High Court where the applicant was charged for. D

[88] Act 505 had also entrusted the Syariah High Court and the Syariah Appeal Court with the supervisory and revisionary powers to enable these superior courts to oversee the effective administration of justice within the Syariah Judicial System (see s 51(1) and s 53 of Act 505 respectively). Matters raised by the applicant could well be raised within the Syariah Judicial System. E

[89] In view of the above, the applicant had failed to exhaust the remedy provided within the Syariah Judicial System, which allows the applicant to seek remedy either in the Syariah Court where he was charged or the Syariah Appeal Court exercising the supervisory and revisionary powers. In view of the above, the plaintiff had not satisfied the requirement of s 44 of the Specific Relief Act 1950. In this case the applicant had blatantly refuse to submit himself to the jurisdiction of the Syariah Court despite the fact that he could still challenge all the process leading to his prosecution in the Syariah High Court. F G

[90] The challenge by the applicant in the JR relates to the act of the second respondent in investigating the offences under s 7(b) and s 9 of Act 559 and subsequently to charge the offenders under the relevant sections of the law. H

[91] The courts have always been reluctant in interfere with the exercise of these functions. The functions of the second and third respondents' are akin to the functions of the enforcement agencies as the second and third respondents were carry out the investigation in respect to offences under these Acts and prosecute the offenders who commit the offences under the law. The respondents were carrying out the functions of law enforcement pursuant to Act 559 and Act 560. I

(see *Empayar Canggih Sdn Bhd v Ketua Pengarah Bahagian Penguatkuasaan Kementerian Perdagangan Dalam Negeri & Hal Ehwal Pengguna Malaysia* Rayuan SMI (01) (b)-21-09/2012 (W)).

[92] In a nutshell the applicant's JR application was directed to the second and third respondents' public function in the exercise of their enforcement and prosecution's functions in relation to Syariah offences under Act 559.

[93] The challenge by the applicant in the JR relates to the act of the second respondent in investigating the offences under s 7(b) and s 9 of Act 559 and they were subsequently charged in court for the offences the offenders under the relevant sections of the law.

[94] The rest of the points and grounds of my decisions were as delivered orally on 6 January 2015 vide the CRT. I had also read the written submissions of the SFC and except for the issue of jurisdiction, which (defer the rest of the points highlighted by the SFC are adopted herein.

CONCLUSION

[95] Having considered the cause papers filed herein and having heard the arguments by the respective learned counsel from the applicants and the respondents having given the matter a very careful and serious consideration, accordingly I dismissed the application for judicial review sought by the applicants vide encl 13. I made no order as to costs.

Application dismissed.

Reported by Afiq Mohamad